STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

THE ESTATE OF DOROTHY KRUSAC,
Deceased, by her personal representative
JOHN KRUSAC,

Plaintiff-Appellee,

v

COVENANT HEALTHCARE assumed name for COVENANT MEDICAL CENTER, INC. COVENANT MEDICAL CENTER-HARRISON assumed name for COVENANT MEDICAL CENTER, INC; COVENANT MEDICAL CENTER, INC.; Michigan Corporations, Jointly and Severally,

Defendants-Appellants.
_____/

Supreme Court
No. 149270

COA No. 321719

Saginaw Circuit Court
No. 12-015433-NH-4

BRIEF BY AMICUS CURIAE MICHIGAN HEALTH AND HOSPITAL ASSOCIATION

DECLARATION OF SERVICE

KITCH DRUTCHAS WAGNER
VALITUTTI & SHERBROOK

CHRISTINA A. GINTER (P54818)
Attorney for Michigan Health and Hospital Association
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7841

TABLE OF CONTENTS

KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK
ATTORNEYS AT LAW
One Woodward Avenue, Suite 2400
Detroit, MI 48226-5485
(313) 965-7900

KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK
ATTORNEYS AT LAW
One Woodward Avenue, Suite 2400
Detroit, MI 48226-5485
(313) 965-7900

KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK
ATTORNEYS & COUNSELORS AT LAW
One Woodward Avenue, Suite 2000
Detroit, MI 48226-5485
(313) 965-7900

INDEX OF AUTHORITIES

CASES

KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK
ATTORNEYS & COUNSELORS AT LAW
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MI 48226-5485
(313) 965-7900

STATUTES

Kitch Drutchas Wagner Valitutti & Sherbrook
One Woodward Avenue, Suite 2500
Detroit, MI 48226-5485
(313) 965-7900

KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK
ATTORNEYS & COUNSELORS AT LAW
One Woodward Avenue, Suite 2400
Detroit, MI 48226-3485
(313) 965-7900

STATEMENT OF QUESTION PRESENTED

WHETHER THE COURT OF APPEALS DECISION IN *HARRISON* V *MUNSON HEALTHCARE, INC*, 304 MICH APP 1 (2014), INCORRECTLY DEPARTED FROM BOTH THE PLAIN LANGUAGE OF THE MICHIGAN PEER/PROFESSIONAL REVIEW CONFIDENTIALITY STATUTES AND THE ESTABLISHED BODY OF CONTROLLING MICHIGAN APPELLATE DECISIONS CONSTRUING AND APPLYING THOSE STATUTES?

KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MI 48226-5485
(313) 965-7900

INTEREST OF AMICUS CURIAE

The Michigan Health & Hospital Association (MHA) is a statewide advocacy organization representing 172 Michigan hospitals providing inpatient care, including long-term acute care and rehabilitation facilities, as well as other specialty hospitals. Of those 172 hospitals, 137 are community hospitals providing inpatient, outpatient and emergency care 24 hours a day, seven days a week, 365 days a year. The MHA represents *all* nonprofit and several for-profit hospitals in the state, advocating on behalf of them and the nearly 10 million people they serve.

Established in 1919, the MHA represents the interests of its member hospitals and health systems in both the legislative and regulatory arenas on key issues and supports their efforts to provide quality, cost-effective and accessible care. The mission of the MHA is to advocate for hospitals and the patients they serve. In that role, it promotes better health within communities; improved quality and safety of patient care; and improved coverage for high-quality, affordable health care services for all Michiganders. In addition, the Association provides members with essential information and analysis of health care policy and offers relevant education to keep hospital administrators and their staff current on statewide issues affecting their facilities. Using its collective voice, the MHA advocates for its members before the legislature, the courts, government agencies, the media and the public.

KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK
ATTORNEYS & COUNSELORS AT LAW
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MI 48226-5485
(313) 965-7900

STATEMENT OF FACTS

Amicus Curiae Michigan Health and Hospital Association relies upon defendants-appellants' Statement of Facts.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485

STANDARD OF REVIEW

The issue presented here is premised in large part on construction of the peer review confidentiality statutes. Issues involving statutory construction are reviewed by this Court *de novo*. *Feyz v Mercy Mem'l Hosp,* 475 Mich 663, 672; 719 NW2d 1 (2006). Clear and unambiguous statutes are to be applied as written. *Id.* at 672.

ARGUMENT

THE COURT OF APPEALS DECISION IN *HARRISON* V *MUNSON HEALTHCARE, INC,* 304 MICH APP 1 (2014), INCORRECTLY DEPARTED FROM BOTH THE PLAIN LANGUAGE OF THE MICHIGAN PEER/PROFESSIONAL REVIEW CONFIDENTIALITY STATUTES AND THE ESTABLISHED BODY OF CONTROLLING MICHIGAN APPELLATE DECISIONS CONSTRUING AND APPLYING THOSE STATUTES.

The published, precedential *Harrison* decision declining to apply peer/professional review confidentiality and privilege to the entirety of a hospital incident report has injected confusion and ambiguity into an area of the law that previously was clear. The *Harrison* Court departed from both the plain language of the Michigan statutes reflecting a broad Legislative mandate of confidentiality and privilege, and the body of controlling decisions of this Court addressing not only the scope of peer review confidentiality and privilege in general, but also the precise issue of application of the peer/professional review confidentiality/privilege to incident reports. Instead of looking to the plain language of Michigan statutes and the established body of Michigan law, the *Harrison* Court imported from other jurisdictions an analysis that is contrary to Michigan's law.

A. Background Regarding Michigan Peer Review Statutes And Case Law Construing Those Statutes.

1. Michigan statutes governing "peer" or "professional" review.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485

The Michigan Legislature has enacted several statutes addressing the "peer review"[1] obligations of hospitals, and the confidentiality of "peer review" information.

Article 17 of the Public Health Code (MCL 333.20101 et seq) addresses the licensing of, and obligations of, health "facilities and agencies," including hospitals, nursing homes, and freestanding surgical outpatient facilities. Part 215 of Article 17 (MCL 333.21501 et seq) addresses the duties and obligations of hospitals.

MCL 333.21513, the hospital "peer review" statute, sets forth the duties and responsibilities of an "owner, operator, and governing body" of a hospital licensed under Article 17, in relevant part, as follows:

The owner, operator, and governing body of a hospital licensed under this article:

---

[1] The term "peer review" commonly has been used by this Court and the Court of Appeals to refer to the statutory mandate in MCL 333.21513 that hospitals must grant staff privileges in accordance with an individual's training, experience, and other qualifications, and must enable an "effective review of the professional practices in the hospital" to ensure quality of care and reduce morbidity and mortality. The term "peer review" does not appear in MCL 333.21513.

The term "peer review" also has been used by this Court and the Court of Appeals to describe the confidentiality and privilege mandated by MCL 333.21515, MCL 333.20175(8), and MCL 331.531-533. The term "peer review" is used only in MCL 331.531. MCL 333.21515 and MCL 333.20175(8) do not refer to "peer review," but address confidentiality of information collected "for or by" individuals or committees assigned a "review function" or a "professional review function."

The term "peer review" has been applied by this Court to various types of documents and other information, including incident reports. MHA recognizes that use of the term "peer review" to describe the hospital mandate and the confidentiality associated with that mandate may have misled some to conclude that confidentiality is dependent upon the conducting of a full or formal "review" by a committee, rather than on the collection of information by or for a committee or an individual assigned a "review function," regardless of whether a formal or committee "review" occurs. Nevertheless, MHA uses the term "peer review" because the term has been used for many years in reference to these statutes, and has been applied in a manner that accurately reflects the scope of the Legislative mandate and protection.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

(a) Are responsible for all phases of the operation of the hospital, selection of the medical staff, and quality of care rendered in the hospital.

(b) Shall cooperate with the department in the enforcement of this part, and require that the physicians, dentists, and other personnel working in the hospital and for whom a license or registration is required be currently licensed or registered.

(c) Shall assure that physicians and dentists admitted to practice in the hospital are granted hospital privileges consistent with their individual training, experience, and other qualifications.

(d) Shall assure that physicians and dentists admitted to practice in the hospital are organized into a medical staff to enable an effective review of the professional practices in the hospital for the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients. This review shall include the quality and necessity of the care provided and the preventability of complications and deaths occurring in the hospital.

(e) [Non-discrimination provisions--omitted]

(f) [Adherence to medical control authority protocols--omitted] [Section 21513.]

The Legislature, through MCL 333.21513, thus has commanded hospitals to provide for internal review of the professional practices of licensees, to grant staff privileges consistent with the qualifications of licensees, and to establish "peer review" processes for review of "professional practices" to reduce morbidity and mortality and improve quality of care. *Attorney General v Bruce,* 422 Mich 157, 164, 169; 369 NW2d 826 (1985); *Dorris v Detroit Osteopathic Hosp Corp,* 460 Mich 26, 41; 594 NW2d 455 (1999); *Feyz v Mercy Mem'l Hosp,* 475 Mich 663, 673; 719 NW2d 1 (2006).

The Legislature, in order to promote "the willingness of hospital staff to provide their candid assessment in peer review proceedings," has enacted measures to protect "peer review" activities from "intrusive public involvement and from litigation." *Feyz,* 475 Mich at 680, citing *Dorris,* 460 Mich at 42, quoting *Attorney General v Bruce,* 422 Mich at 169. One of the measures adopted to protect peer review activities from "litigation" and "public

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2000
Detroit, Michigan 48226-5485

involvement" is MCL 333.21515, which follows MCL 333.21513 in Part 215 of Article 17 of the Public Health Code.

MCL 333.21515 provides that "records, data, and knowledge" collected "for or by" "individuals or committees" assigned a review function described in Article 17 "are confidential," "shall be used only for the purposes" provided in Article 17, and "shall not be available for court subpoena":

> The records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena. [Section 21515.]

MCL 333.21513 and MCL 333.21515 address only the peer review obligations of, and confidentiality/privilege of the "records, data, and knowledge" of, hospitals, although at least one other type of health facility (freestanding surgical outpatient facility) has its own "peer review" mandate (see MCL 333.20813).

In addition to the hospital peer review mandate and peer review confidentiality/privilege statute in Part 215 of Article 17, the Public Health Code in Article 17, Part 201 ("General Provisions") also provides generally for confidentiality of "professional review," in MCL 333.20175(8). Section 20175(8), like MCL 333.21515, mandates confidentiality for "records, data, and knowledge" collected "for or by" "individuals or committees" assigned a review function.[2] MCL 333.20175(8)'s confidentiality provision

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2000
DETROIT, MICHIGAN
48226-5485

[2] Section 20175(8) differs from MCL 333.21515 in that it refers to a "professional review function," rather than "a review function described in this article."

applies to any "health facility or agency[3]," as well as certain "institution[s] of higher learning":

> The records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency, or an institution of higher education in this state that has colleges of osteopathic and human medicine, are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena. [MCL 333.20175(8).]

Thus, MCL 333.20175(8), like MCL 333.21515, provides that "records, data, and knowledge" collected "for or by" individuals or committees assigned a professional review function are confidential and are not "subject to," or "available for," court subpoena. See *Feyz,* 475 Mich at 680-681, 681 n 52 (these statutes, along with MCL 331.533, provide that such information is "confidential and not discoverable").

In addition to the Public Health Code "peer review" confidentiality/privilege statutes (MCL 333.20175(8) and MCL 333.21515), there is another set of statutes that addresses confidentiality, privilege, and the limited permitted uses of "peer review" information. These three statutes, MCL 331.531, 331.532, and 331.533, are not part of the Public Health Code, but were enacted in a separate act, 1967 PA 270, addressing "Release of Information for Medical Research and Education".

MCL 331.531(1) provides as follows:

> A person, organization, or entity may provide to a review entity information or data relating to the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider.

A "review entity" is defined in MCL 331.531(2) to include a "duly appointed peer

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

[3] "Health facility or agency" is defined in MCL 333.20106 to include a hospital, nursing home, clinical laboratory, and a freestanding outpatient surgical facility, among others.

review committee" of, among others, a "health facility or agency licensed under article 17 of the Public Health Code…"

MCL 331.532 sets forth a list of the purposes for which a "record of the proceedings or of the reports, findings, and conclusions of a review entity" may be released or published.

MCL 331.533 governs confidentiality and privilege of information. The second sentence of section 533 provides that, except as provided in MCL 331.532, the "record of a proceeding," the "reports, findings, and conclusions of a review entity," and the "data collected by or for a review entity under this act," are confidential and are not discoverable or admissible as evidence in a civil action:

> Except as otherwise provided in section 2 [MCL 331.532], the record of a proceeding and the reports, findings, and conclusions of a review entity and data collected by or for a review entity under this act are confidential, are not public records, and are not discoverable and shall not be used as evidence in a civil action or administrative proceeding.

MCL 331.533 also has been recognized by this Court as providing for confidentiality of,and precluding discovery of, records, data, and knowledge collected by or for peer review entities. *Feyz,* 475 Mich at 680-681, 681 n 52.

2. Decisions of this Court and of the Michigan Court of Appeals addressing confidentiality of peer/professional review information.

This Court and the Court of Appeals have addressed the application of these peer/professional review statutes, and the confidentiality and privilege of peer/professional review information, in many different contexts. The decisions have encompassed both aspects of peer/professional review: (1) review of the quality of care provided by a particular physician or the qualifications or competence of a physician, in the context of, for example, granting or renewing hospital staff privileges; and (2) review of specific medical care and treatment (such as, for example, a single incident involving a particular patient, or the efficacy

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

or safety of a particular technique or treatment, or the rates and causes of infection, or the avoidability of unexpected adverse outcomes).

For many years, the Michigan courts have recognized the broad language of the Michigan peer/professional review confidentiality statutes and the link between such confidentiality and the peer/professional review mandate imposed upon hospitals by the Legislature. The Michigan appellate courts repeatedly have held that these statutes provide that peer/professional review information is confidential, is not subject to civil discovery requests or to administrative or criminal subpoenas, and/or is not admissible at trial.

In a few early "peer review" cases involving discovery requests in civil actions, this Court addressed only limited issues relating to these statutes or their predecessors. For example, in *Marchand v Henry Ford Hosp,* 398 Mich 163; 247 NW2d 280 (1976), this Court addressed MCL 331.422(2) (predecessor of MCL 333.21515, stating that records, data and knowledge "collected for or by individuals or committees assigned this review function are confidential" and "shall not be available for court subpoena"), with focus on the meaning of the phrase "collected for or by." The *Marchand* Court held that MCL 331.422(2) created an "evidentiary privilege," but that the privilege only applied if data was "collected for or by individuals or committees assigned this review function." *Id.* at 167.

An evidentiary hearing held by the trial court in *Marchand* had revealed that the data there (regarding the use of a medical technique and its results) had been collected by a physician, who had not been assigned a review function and had not been requested by anyone else to collect the data, but had acted on his own initiative, for his own "enlightenment." The data later was presented by the doctor at a staff meeting. The *Marchand* Court held that the data was not protected by the statute because there was no

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485

"directive" from a peer review committee to collect the data, and that the *ex post facto* submission of the data did not satisfy the "collection" requirement. *Id.* at 168.

In *Monty v Warren Hosp Corp,* 422 Mich 138; 366 NW2d 198 (1985), this Court addressed MCL 333.21515 and MCL 333.20175(5) (predecessor to current MCL 333.20175(8)), in the context of civil discovery requests for information about hospital staffing and disciplinary actions against the defendant physicians and other physicians with staff privileges at the hospital (a type of "peer review" relating to credentialing of physicians that differed from the issue in *Marchand*). This Court's only holdings in *Monty* were that, on remand, the trial court should hold an *in camera* hearing, rather than a hearing in open court, to determine whether peer review protection applies; and that it was proper for the trial court to require identification of the documents at issue by date and author. *Id.* at 146.

In an oft-quoted paragraph, the *Monty* Court stated that "mere submission" does not satisfy the "collection" requirement, and described information that the trial court might consider on remand (such as medical staff bylaws and internal hospital regulations). *Id.* at 146-147. The *Monty* Court, however, did not apply that standard or make any ruling on whether the information sought there was, or was not, confidential.

Following *Marchand,* and just a few months after *Monty,* this Court issued a landmark decision on peer/professional review confidentiality/privilege that remains controlling authority today. *Attorney General v Bruce,* 422 Mich 157; 369 NW2d 826 (1985), involved a physician licensing investigation conducted by the Michigan Department of Medicine, through its Licensing Division. The Department issued an investigative subpoena seeking information obtained by a hospital during the hospital's internal investigation into the death of that physician's patient (an investigation that resulted in suspension of the physician's

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-3489

hospital staff privileges). The information sought by the State included any "incident reports" or testimony compiled by the hospital. *Id.* at 162 n 3.

The Attorney General argued that the protection in MCL 333.21515 for "records, data, and knowledge collected for or by" individuals or committees assigned a review function did not protect such information from licensing investigations. This Court held, however, that MCL 333.21515 is "unambiguous" and establishes that such "records, data, and knowledge" are to be used only for the purposes provided in Article 17; and that licensing investigations, conducted under the authority of Article 15, are not within the scope of that permitted use.

In rejecting the Attorney General's argument that denying access to the information obtained by a hospital during an internal investigation defeats the Legislature's intent to permit the State to conduct licensing investigations, this Court discussed the peer review obligation imposed by the Legislature on hospitals:

> Hospitals are required to establish peer review committees whose purposes are to reduce morbidity and mortality and to ensure quality of care. MCL 333.21513 [MSA citation omitted.] Included in their duties is the obligation to review the professional practices of licensees, granting staff privileges consistent with each licensee's qualifications. MCL 333.21513(c). [MSA citation omitted.] [*Id.* at 169.]

The Court further stated the rationale for the Legislative mandate of confidentiality of such "records, data, and knowledge," as follows:

> Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care. To subject the discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. [Emphasis in original. *Bredice v Doctors Hospital, Inc,* 50 FRD 249, 250 (D DC, 1970), *aff'd without opinion* 156 US App DC 199; 479 F2d 920 (1973).] [*Attorney General v Bruce,* 422 Mich at 169.]

The Court stated that "[i]n enacting secs. 20175(5) and 21515, the Legislature

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

provided a strong incentive for hospitals to carry out their statutory duties." *Id.* at 169-170. The Court further noted that, although there is a "strong public interest" in State investigation of the competency of licensees, the State may obtain information by interviewing hospital employees and obtaining patient records on its own. *Id.* at 170.

Following this Court's recognition of the importance of peer review confidentiality to protect information even against the State's subpoena in *Attorney General v Bruce,* the Court of Appeals held that peer review confidentiality applies to two specific types of "records, data, and knowledge": an incident report involving a patient's fall in *Gallagher v Detroit-Macomb Hosp Ass'n,* 171 Mich App 761; 431 NW2d 90 (1988) (citing MCL 333.21515 and MCL 333.20175(5)), and a physician's credentialing file in *Dye v St John Hosp and Med Center,* 230 Mich App 661; 584 NW2d 747 (1998).

In *Dye*, the Court of Appeals applied MCL 333.20175(8), MCL 333.21515, and MCL 331.533 to hold that documents in a credentialing file are not discoverable in a medical malpractice action. The *Dye* Court rejected the plaintiff's argument that peer review confidentiality under MCL 333.20175(8) and MCL 333.21515 is dependent on whether "records, data, and knowledge" are gathered for "retrospective" review of a past incident, or for a "prospective" determination of whether credentials should be granted to a physician, i.e. for "current patient care." The *Dye* Court declined to create or apply any exception to the statutory confidentiality based on whether the review was "retrospective" or "prospective." *Dye,* 230 Mich App at 668-669.

The *Dye* Court also clarified the meaning of the statutory phrase "collected for or by," first addressed in *Marchand.* The *Dye* Court held that the materials submitted by a physician seeking staff privileges, or by others on his behalf, are "collected for or by" the credentials

Kitch Drutchas Wagner Valitutti & Sherbrock
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485

committee, because they are submitted "pursuant to expectations or directives of the credentials committee," given that the doctor "was aware of" the fact that the committee wanted to review those materials. *Id.* at 670-671.

Shortly after *Dye*, this Court again addressed applicability of peer review protection to an incident report, in *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999). In the consolidated case of *Gregory v Heritage Hospital,* this Court reversed a trial court order requiring a hospital to produce an incident report relating to an assault against the plaintiff by another patient, and remanded for further proceedings to determine applicability of peer review protection. This Court, citing *Attorney General v Bruce,* concluded that MCL 333.20175(8) and MCL 333.21515 apply, and could preclude discovery of the incident report, stating as follows:

> Hospital personnel are expected to give their honest assessment and reviews of the performance of other hospital staff in incidents such as the one in the present case. Absent the assurance of confidentiality as provided by secs. 21515 and 20175(8), the willingness of hospital staff to provide their candid assessment will be greatly diminished. This will have a direct effect on the hospital's ability to monitor, investigate, and respond to trends and incidents that affect patient care, morbidity, and mortality. [*Id.* at 42-43.]

Following *Dye* and *Dorris,* the Court of Appeals held that the peer review protection in MCL 333.21515 also applies as against search warrants issued by the Attorney General in a criminal investigation into a patient's death (*In re Investigation of Lieberman,* 250 Mich App 381; 646 NW2d 199 (2002)), and in all civil suits, regardless of the theory of recovery (*Ligouri v Wyandotte Hosp and Med Center,* 253 Mich App 372; 655 NW2d 592 (2002)).

This Court again had the opportunity to address the nature and extent of peer review confidentiality and immunity in *Feyz v Mercy Mem'l Hosp,* 475 Mich 663; 719 NW2d 1 (2006). In *Feyz*, the plaintiff was a physician who brought suit against a hospital that had taken disciplinary action against him as a result of the "peer review" process.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2000
Detroit, Michigan 48226-3425

This Court in *Feyz* noted that the Legislature, in MCL 333.21513, has "commanded" hospitals to "establish peer review committees to review 'professional practices' in order to 'reduc[e] morbidity and mortality and improve[e] the care provided in the hospital for patients.' " *Feyz,* 475 Mich at 673. In addressing peer/professional review immunity, the *Feyz* Court stated as follows:

> Peer review is " ' "essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care." ' " In order to promote "the willingness of hospital staff to provide their candid assessment" in peer review proceedings, the Legislature has enacted two primary measures to protect peer review activities from intrusive public involvement and from litigation. First, the Legislature has provided that the records, data, and knowledge collected for or by peer review entities are confidential and not discoverable. Furthermore, and relevant to this case, the Legislature has granted immunity to persons, organizations, and entities that provide information to peer review groups or perform protected peer review communicative functions. [*Feyz,* supra at 680-681.]

This Court and the Court of Appeals long have recognized that peer/professional review confidentiality and privilege is essential to the Legislative mandate that hospitals carry out a peer/professional review function, and that the confidentiality applies to all types of "records, data, and knowledge" that otherwise meet the statutory criteria.

B. The Court of Appeals' Creation, In *Harrison*, Of An Extrastatutory Exception To Peer/Professional Review Confidentiality For "Objective Facts Gathered Contemporaneously With An Event" Is In Conflict With Plain Statutory Language, Departs From The Body of Established Michigan Case Law, Introduces Ambiguity That Has Caused Widespread Confusion Regarding The Duties Of Hospitals and Their Attorneys, And Will Have A Significant Chilling Effect On The Legislatively Mandated Peer/Professional Review Process.

The Court of Appeals in its published opinion in *Harrison* created an extrastatutory exception to peer/professional review confidentiality for "objective facts gathered contemporaneously with an event." *Harrison v Munson Healthcare, Inc,* 304 Mich App 1, 32; 851 NW2d 549 (2014). According to *Harrison*, such "objective facts" are "not subject to

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-3499

a peer review privilege." *Id.* at 27.

This exception is entirely inconsistent with the plain language of the hospital peer/professional review confidentiality statutes. The exception also departs from the established body of Michigan law applying the peer/professional review statutes, and introduces ambiguity into the peer/professional review protection that is having a significant chilling effect on the Legislatively-mandated hospital peer review process.

1. Relying heavily on cases from other jurisdictions rather than on the text of the statutes or the body of established Michigan law, the *Harrison* Court created an ill-defined, extrastatutory exception to peer/professional review confidentiality for "objective facts gathered contemporaneously with an event."

The Court of Appeals in *Harrison* considered application of peer/professional review confidentiality to a multiple-page incident report. The first page of the report contained handwritten notes by Nurse Gilliand, who was present in the operating room during the surgery. The Court noted that Nurse Gilliand's notes had been written approximately one and a half hours after the surgery. *Harrison,* 304 Mich App at 14. The second page of the report contained a note dated fifteen days after the surgery and written by Barbara Peterson, Munson's operating room manager, apparently reflecting Ms. Peterson's conclusions following a "review" during which she had conducted interviews with persons present in the operating room. *Id.* at 14-15, 18.

The *Harrison* Court created an ill-defined, extratextual exception to the peer review confidentiality statutes, for "factual information objectively reporting contemporaneous observations or findings" (*Id.* at 30) or "[o]bjective facts gathered contemporaneously with an event" (*Id.* at 32):

> [Nurse] Gilliand's contemporaneous, hand-written operating-room observations were not subject to a peer-review privilege. In other words, the

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan
48226-5485

initial page of the incident report did not fall within the protection of MCL 333.21515. The balance of the report, however, reflected a review process and was confidential. [*Harrison,* 304 Mich App at 27.]

The *Harrison* Court relied upon three cases from other jurisdictions discussed in this Court's 1985 *Monty* decision: *Bredice v Doctors Hosp, Inc,* 50 FRD 249 (D DC, 1970); *Davidson v Light,* 79 FRD 137 (D Colorado, 1978); and *Coburn v Seda,* 677 P2d 173 (Wn, 1984). The *Harrison* Court stated as follows:

> [w]e derive from these three cases a distinction between factual information objectively reporting contemporaneous observations or findings, and "records, data, and knowledge" gathered to permit an effective review of professional practices. Gilliand's notation reporting that the Bovie "was laid on drape in a fold" falls in the former category and as such was not privileged from disclosure, despite its inclusion on a form labeled "Quality/Safety Monitoring." Employing *Davidson,* we find it critical that Gilliand's note concerned a single patient and was "generated because of a specific incident or occurrence rather than a general desire for discussion or improvement." *Davidson* 79 FRD at 140. And as *Coburn* counseled, this information is not to be "shielded merely by its introduction at a review committee meeting." *Coburn,* 101 Wn2d at 277. These excerpts from the cases cited by our Supreme Court in *Monty* give context to the *Monty* Court's admonition that "mere submission of information to a peer review committee does not satisfy the collection requirement...." *Monty,* 422 Mich at 146. Here, Gilliand's preparation of a firsthand, contemporaneous factual report about a patient that she elected to place on a risk-management form rather than within the patient's medical record did not trigger the statutory privilege. [*Harrison,* 304 Mich App at 30-31.]

Finally, the *Harrison* Court concluded that, although MCL 333.21515 and MCL 333.20175(8) shield from disclosure materials "accumulated for study" by individuals or committees "assigned a professional review function," "[o]bjective facts gathered contemporaneously with an event do not fall within that definition." *Id.* at 32.

The Court held, however, that the second page of the incident report is subject to confidentiality/privilege, because there the Operating Room Manager "summarized the result of the investigation Peterson conducted in her role as a peer-reviewer" and thus the documentation "reflects a deliberative review process." *Harrison,* 304 Mich App at 34.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
DETROIT, MICHIGAN
48226-5485

2. The *Harrison* Court's adoption of an extrastatutory exception for "objective facts gathered contemporaneously with an event" is inconsistent with plain statutory language.

The *Harrison* Court's conclusion--that "objective facts gathered contemporaneously with an event" and included in an otherwise protected incident report are not confidential and are subject to compelled disclosure by court order--is inconsistent with the plain language of the "peer review" statutes. See *Feyz,* 475 Mich at 672-673 (clear and unambiguous statutes are to be applied as written, using the "plain meaning" of the statutory words, as well as their placement and purpose in the statutory scheme).

Both MCL 333.20175(8) and MCL 333.21515 provide that confidentiality applies to "records, data, and knowledge collected for or by individuals or committees assigned" a "review function described in this article [Article 17 of the Public Health Code]" (MCL 333.21515) or a "professional review function in a health facility or agency" (MCL 333.20175(8)). These statutes are not ambiguous. See *Attorney General v Bruce,* 422 Mich at 165, 167 (provision that peer review materials shall only be used for purposes "provided in this article" is unambiguous).

Likewise, MCL 331.533 provides for confidentiality and nondiscoverability for "data collected by or for a review entity under this act." *Feyz,* 475 Mich at 680-681 n 52.

The only questions to be determined under MCL 333.20175(8) and MCL 333.21515 are whether the incident report as a whole, or information contained within, consists of (1) "records, data, and knowledge" that was (2) "collected for or by" (3) "individuals or committees" (4) assigned a review or professional review function. As stated by the Court of Appeals in *Dye,* 230 Mich App at 665 n 2:

> Under the statutory provisions we discuss more fully below, the relevant question is whether Dr. Paz' personnel/credentials file contains information

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

> "collected for or by individuals or committees assigned a professional review function. ..." MCL 333.20175(8) [MSA citation omitted.] If it does, the statute protects it from discovery. The statutory purpose, to facilitate the frank exchange of information in the important task of overseeing medical personnel and assuring patient care, would be undermined if particular information properly collected for or by a review entity was later subject to disclosure upon a determination that, for some unanticipated reason, it was deemed not to be "in the category of peer review material."

The *Harrison* Court held that "objective facts gathered contemporaneously with an event" fall outside the statutory descriptions. *Harrison,* 304 Mich App at 32. To the contrary: neither the type of information at issue ("objective facts"), nor the timing of the collection ("contemporaneously with an event") removes those "facts" from the scope of protection under the plain language of MCL 333.21515 and MCL 333.20175(8).

"Objective facts" fall within the statutory definition of "records, data, and knowledge."[4] "Facts" are both "data" and "knowledge." None of the statutes excludes any type of "records, data, and knowledge" from its confidentiality provisions (other than for the permitted, but not required, disclosures under MCL 331.532, see *Dye, supra* at 673).

The timing of the collection ("contemporaneously with the event") also does not operate to exclude such facts, i.e. "records, data, and knowledge," from statutory protection. First, the statutes do not explicitly provide that confidentiality or privilege depends on the timing or manner of collection (when or how collected), but only on by whom or for whom

---

[4] As was acknowledged by the Court of Appeals even in *Centennial Healthcare Management Corp v Dep't of Consumer and Ind Servs,* 254 Mich App 275; 657 NW2d 746 (2002)--a case in which the Court of Appeals sought to limit statutory "peer review" protection to a "deliberative process" privilege (see discussion below in argument (B)(4))--the use of the terms "records, data, and knowledge" makes this a "very broad definition." *Id.* at 287. The dictionary definition of "knowledge" alone includes "[t]he sum or range of what has been perceived, discovered, or learned," as well as "[s]pecific information about something." *Id.* at 287 n 9, citing The *American Heritage Dictionary of the English Language* (3d ed, 1996), p 998.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AT LAW
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

(and, implicitly, for what purpose) "records, data, and knowledge" are "collected."

Second, even if the timing of the "collection" could, in certain cases, shed light on the "collection" question--whether "records, data, and knowledge" are "collected for or by individuals or committees assigned a" review or professional review function (as opposed to collected "by or for" someone else, or for some other purpose)--there is no statutory basis for the *Harrison* Court's conclusion that "contemporaneous" collection automatically, and in all cases, excludes such facts from protection.

This Court in *Marchand* held that the circumstances of the submission of data (in that case, data regarding a medical treatment collected by a physician not assigned a professional review function, for his own "enlightenment," without a directive from anyone, and later submitted at a staff meeting), warranted a conclusion that the data was not "collected for or by" individuals or committees assigned a review/professional review function. In so holding, the *Marchand* Court also stated that the "*ex post facto*" submission of the data at a staff meeting did not satisfy the "collection" requirement. *Marchand,* 398 Mich at 168.

A close reading of *Marchand,* however, reveals that the "no collection" holding did not rest on the timing of collection, but rather on the absence of a request or directive by an individual or committee "assigned a professional review function." *Marchand* at 168-169 (no "directive" to collect data; "[n]obody asked him to do that").

That the presence of a "directive" or "request" to "collect" information--not the timing of the collection--is the key to the "collection" requirement was confirmed by the Court of Appeals in *Dye v St John Hosp and Medical Center,* 230 Mich App 661; 584 NW2d 797 (1998) lv den 459 Mich 1005; 595 NW2d 856 (1999). *Dye* construed *Marchand* and held that materials submitted for purposes of a physician's application for staff privileges were

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

"collected for or by" the credentialing committee, because the doctor was "aware of" the requirements of the committee, and he either submitted the materials or had them submitted by others pursuant to the "expectations or directives" of the committee. *Id.* at 670-671.

Thus, not only is there no statutory basis for a rule of automatic exclusion based on the "contemporaneous" timing of collection, but Michigan cases construing the "collection" requirement make it clear (and correctly so) that the key issue in "collection" is not timing, but rather whether there is some "request" or "directive" for, or "expectation" of, collection.

The "contemporaneous" collection of "records, data, and knowledge" does not establish, or even suggest, the absence of such a "request, "directive" or "expectation." "Contemporaneous" collection does not present the same obvious concerns that "ex post facto" submission of data did in *Marchand.* In the case of an incident report that contains "contemporaneously" collected facts, a "request," "directive," or "expectation" for collection could be satisfied through, for example: (1) a specific, contemporaneous request by an individual (such as a supervisor assigned a review function) or a committee assigned a review review function that an incident report be prepared after the occurrence of an event, or (2) a standing written, or unwritten, institutional or departmental "directive," policy, or "expectation" that incident reports should be prepared when certain events occur. *Dye, supra.*

Attempts to graft on extratextual exceptions based on "policy" arguments have been rejected by this Court and by the Court of Appeals. See *Attorney General v Bruce,* 422 Mich at 173 (to hold that peer review information is not protected "would require us to create an exception to the privilege granted such information by the Legislature; that is not for us to do"); *Ligouri v Wyandotte Hospital and Medical Center,* 253 Mich App 372, 377; 655 NW2d 592 (2002) ("[n]othing in the plain language of [MCL 333.20175(8) or MCL 333.21515]

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

makes protection of quality assurance or peer review reports from subpoena contingent on the type of claim asserted by the proponent of the subpoena, and the trial court erred by supplementing the unambiguous statutory language with this unstated condition"). Here, the exception for "objective facts" that are "gathered contemporaneously" with an event has no basis in the text of the statutes.

This is not to say that "objective facts" can never be discovered simply because they also are "collected" for or by an individual or committee assigned a review function. As this Court has recognized, facts usually can be discovered by means other than compelling production of confidential peer/professional review materials. See *Attorney General v Bruce*, 422 Mich at 170. A medical malpractice plaintiff is free to depose witnesses, not about their participation in the peer review process, but about their memory of an event itself.

As recognized by this Court in *Bruce*, and contrary to the *Harrison* analysis, the availability of "facts" through other means actually lessens any negative impact of "peer review" confidentiality/privilege on litigation. More importantly, the availability of facts through other means (or the non-availability in a case such as *Harrison* due to loss of witness memory) does not control whether an incident report that meets the requirements of MCL 333.20175(8), MCL 333.21515, and/or MCL 331.533 is protected against disclosure.

3. The *Harrison* Court's conclusion that "objective facts gathered contemporaneously with an event" are not "records, data, and knowledge" subject to peer/professional review confidentiality, is inconsistent with the established body of controlling Michigan cases holding that peer review confidentiality applies to incident reports containing just such information.

The *Harrison* Court's conclusion that "objective facts" collected "contemporaneously" by or for individuals or committees assigned a review function are not protected by statutory peer review confidentiality is a significant departure from a long line of

Kitch Drutchas Wagner Valitutti & Sherbrock
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2000
Detroit, Michigan 48226-3489

decisions of this Court and the Court of Appeals, applying peer review confidentiality to incident reports that contain precisely such "objective facts." This established line of decisions is correct in its application of the plain language of the controlling statutes, and constituted controlling authority that should have been followed by the *Harrison* Court.

Thirty years ago, the Court of Appeals in *Bishop v St John Hosp,* 140 Mich App 720; 364 NW2d 290 (1984), held that hospital incident reports are subject to peer review confidentiality under MCL 333.21515. In *Bishop,* the Court addressed the admissibility at trial of an incident report regarding a patient's fall in a medical malpractice action. The plaintiffs sought a new trial in part on the ground that the jury should have been instructed that it could draw an adverse inference from the "withholding" of the report. The *Bishop* Court held that no adverse inference was appropriate because the hospital "had a right to withhold the incident report" under MCL 333.21515. *Id.* at 726.

A year later, in *Attorney General v Bruce,* 422 Mich 157 (1985), this Court held that MCL 333.21515 precluded the Attorney General from obtaining information collected during a hospital's investigation of the death of a patient, including "incident reports" and testimony acquired during the investigation. *Id.* at 162 n 3, 173.

The Court of Appeals in *Gallagher v Detroit-Macomb Hosp Ass'n,* 171 Mich App 761, 769; 431 NW2d 90 (1988), then held that an incident report regarding a patient's fall was protected by peer review and thus was not admissible at trial.

Fifteen years ago, this Court addressed application of MCL 333.20175(8) and MCL 333.21515 to a hospital incident report in *Dorris v Detroit Osteopathic Hosp Corp,* 460 Mich 26; 594 NW2d 455 (1999), and the consolidated case, *Gregory v Heritage Hosp.* In *Gregory,* the plaintiff alleged that the hospital failed to protect her from an assault by another patient,

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
Detroit, Michigan 48226-5485

whose identity was unknown to the plaintiff. The plaintiff sought production of any incident reports and related investigatory documents, to which the hospital objected on grounds of peer review confidentiality/privilege.

This Court in *Dorris* relied on *Gallagher, supra,* for the proposition that an incident report may be subject to peer review protection. In holding that the trial court erred in ordering production of the incident report, and that a remand was necessary to determine the applicability of peer review protection, the Court stated as follows:

> Hospital personnel are expected to give their honest assessment and reviews of the performance of other hospital staff in incidents such as the one in the present case. Absent the assurance of confidentiality as provided by secs. 21515 and 20175(8), the willingness of hospital staff to provide their candid assessment will be greatly diminished. This will have a direct effect on the hospital's ability to monitor, investigate, and respond to trends and incidents that affect patient care, morbidity, and mortality. [*Id.* at 42-43.]

In 2002, the Court of Appeals in *Ligouri v Wyandotte Hospital and Medical Center,* 253 Mich App 372; 655 NW2d 592 (2002), held that investigation or incident reports are subject to peer review protection under MCL 333.20175(8) and MCL 333.21515, notwithstanding the fact that the plaintiff in that case alleged "ordinary" negligence by the hospital, rather than medical malpractice. The *Ligouri* Court emphasized that the peer review statutes were intended to "*fully* protect quality assurance/peer review records from discovery." *Id.* at 376 (emphasis in original). The *Ligouri* Court held that the trial court had erred in "supplementing the unambiguous statutory language" with the "unstated condition" that confidentiality is dependent on the type of claim asserted. *Id.* at 377. The *Ligouri* Court further noted that, while production of the records might appear to be the "equitable result," equity "may not be invoked to avoid application of a statute." *Id.* at 377 n 4.

Notwithstanding the *Harrison* Court's extensive discussion of the application of peer review confidentiality to incident reports in general, the *Harrison* Court did not cite *Ligouri,*

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

and did not address the holding or reasoning of *Gregory*. Instead, *Harrison* relied upon *Centennial Healthcare Management Corp v Dep't of Consumer and Industry Services,* 254 Mich App 275; 657 NW2d 746 (2002), a case that is either distinguishable from, or in conflict with, *Gregory* and *Ligouri* (see discussion in argument (B)(4), below).

The *Harrison* Court's conclusion that "objective facts" recorded in an incident report are not confidential is not consistent with the controlling authority, set forth above, holding that "incident reports" as a whole are indeed subject to protection, if they are collected for or by individuals or committees assigned a review/professional review function. This is the precise nature of "incident reports": they consist of facts collected as close as possible to the time of an "incident," for the purpose of determining what occurred and whether, or how, future incidents may be prevented.

4. The *Harrison* Court incorrectly relied on the Court of Appeals decision in *Centennial Healthcare Management Corp v Dep't of Consumer and Industry Services*, and on cases from other jurisdictions.

The *Harrison* Court incorrectly relied on the Court of Appeals decision in *Centennial Healthcare Management Corp v Dep't of Consumer and Industry Services,* 254 Mich App 275; 657 NW2d 746 (2002), a case that is (or should be) limited to the unique context of nursing home "accident records and incident reports" promulgated pursuant to administrative rules. The *Harrison* Court also incorrectly relied on decisions from other jurisdictions, ignoring established Michigan law and the plain language of the unique Michigan statutes.

(a) The *Harrison* Court incorrectly imported the analysis from *Centennial*, which does not involve hospital peer/professional review and is limited to the unique context of administrative rules governing the preparation and availability of nursing home "accident records and incident reports."

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-3485

The *Harrison* Court relied heavily, and incorrectly, on the prior Court of Appeals decision in *Centennial Healthcare Management Corp v Dep't of Consumer and Industry Services,* 254 Mich App 275; 657 NW2d 746 (2002).[5] This was error, because *Centennial* is (or should be) limited to the unique context of administrative rules governing the content and availability of "accident records and incident reports" required to be prepared by nursing homes and to be available for outside review by the State. *Harrison* instead should have followed the controlling decisions regarding hospital peer/professional review confidentiality: *Dorris/Gregory* and *Ligouri.*

Centennial involved a licensing survey of a nursing home conducted by the Michigan Department of Consumer and Industry Services (MDCIS). MDCIS requested "incident & accident reports" for several patients. The request for "incident and accident reports" referred to documents that were required to be generated under administrative rules promulgated by MDCIS, 1979 AC, R 325.21101, and 1979 AC, R 325.21104. R 325.21104 required that an "accident record or incident report shall be prepared for each accident or incident involving a patient, personnel, or visitor." The two rules also set forth specific information that must be included in the "accident record or incident report," and provided that "accident records and incident reports" "shall be available" to MDCIS.

The nursing home asserted that its "incident and accident reports," or "I & A reports," had been generated by its quality assurance and assessment committee, and constituted protected peer review under MCL 333.20175(8). After the State imposed penalties as a result of the survey, the nursing home filed suit, arguing that the penalties constituted retaliation for its assertion of peer review protection with respect to the "I & A reports."

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AT LAW
ONE WOODWARD AVENUE, SUITE 2000
DETROIT, MICHIGAN 48226-5485

[5] It appears that no application for leave to appeal to this Court was filed.

The question presented to the Court of Appeals in *Centennial* was whether the administrative rules requiring nursing homes to prepare "accident records or incident reports" and to make those records or reports available to MDCIS, are in conflict with peer review protection under MCL 333.20175(8).[6] The *Centennial* Court held that the administrative rules providing for production of "accident records and incident reports" to MDCIS do not conflict with MCL 333.20175(8). The *Centennial* Court held that the administrative rules did not "undermine" the statutory peer review privilege, because only a holding that the provisions are consistent would "effectuate the other purposes outlined in the Public Health Code--especially those involving licensing." *Id.* at 291.

Prior to *Harrison*, *Centennial's* holding that production to MDCIS of the "accident records and incident reports" mandated by administrative rules did not violate peer/professional review protection generally had not been applied by trial courts to hospital incident reports, or in the context of civil litigation, for several reasons. First, the Court of Appeals in *Ligouri* v *Wyandotte Hosp and Med Center* had reiterated, in a published decision issued just a few months prior to *Centennial*, that hospital incident reports are subject to peer/professional review confidentiality. Second, the Court of Appeals recognized, albeit in an unpublished decision, that *Centennial* is inapplicable to civil litigation involving private litigants, rather than to requests for "I & A reports" by the MDCIS. See *Maviglia v West Bloomfield Nursing & Convalescent Center, Inc,* unpublished opinion per curiam of the Court of Appeals, issued November 9, 2004 (Docket No 248796).

Third, *Centennial* did not involve a hospital incident report, but "I & A reports." As MDCIS argued in *Centennial*, the nursing home was not required to meet its administrative

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AT LAW
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485

[6] MCL 333.21515 applies only to hospitals, and thus did not apply in *Centennial.*

obligation of creating an "I & A" report to be available to MDCIS, through use of an internal peer review process. It could not be said in *Centennial* that the "I & A reports" at issue there were generated solely, or even primarily, for internal peer review, but instead, at least in part, for the distinct purpose of submission to MDCIS.

The *Centennial* Court itself also recognized the distinction between hospital and nursing home "peer review":

> *Dye* [*v St John Hospital and Medical Center*] involved MCL 333.21513(d), which specifically commands the creation of a peer review body concerned with evaluating hospital practices. A similar command is not found for nursing homes. Further, MCL 333.21513(c) provides that a hospital "[s]hall assure that physicians and dentists admitted to practice in the hospital are granted hospital privileges consistent with their individual training, experience, and other qualifications." Thus, article 17 specifically commands that hospitals review the records at issue in *Dye* when evaluating not only if a physician will be given staff privileges, but the level of privileges that should be extended. There is no similar directive in the statutes applicable to nursing homes regarding I & A reports. [*Centennial,* 254 Mich App at 291 n 12.]

For all of these reasons, the *Harrison* Court erred in importing the analysis and holding of *Centennial* from the unique context of administrative rules governing nursing home "accident records and incident reports" to hospital incident reports collected by an individual assigned a professional review function.

Finally, to the extent that *Harrison* rests on an analysis in *Centennial* that was focused on an attempt to limit peer review protection only to the "deliberative process," and if *Centennial* is not limited to its unique factual context, any analysis in *Centennial* suggesting that peer review protection should be so limited, or cannot be applied to "facts," should be overruled as inconsistent with the plain language of the statutes and with controlling law, for the same reasons set forth in the arguments (B)(2) and (3) above.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
DETROIT, MICHIGAN 48226-5485

(b) The *Harrison* Court's reliance on decisions in other jurisdictions is misguided, given Michigan's unique

statutes and the body of case law in this State providing guidance on these issues.

The *Harrison* Court also relied heavily on decisions from other jurisdictions addressing the confidentiality of incident reports or other "peer review" information under other states' unique peer/professional review statutes. *Harrison,* 304 Mich App at 28-30, 32-34. It was both incorrect and unnecessary for the *Harrison* Court to look to, and rely upon, these decisions from other jurisdictions, while ignoring the large body of law already decided by Michigan Courts on this issue (including *Dorris/Gregory, Attorney General v Bruce,* and *Ligouri*). The issue turns heavily, if not entirely, on the plain language of Michigan's peer/professional review confidentiality statutes, which differ in important respects from many of the statutes at issue in other jurisdictions.

Two of the out-of-state cases used as "guideposts" by the *Harrison* Court (*Id.* at 28)--*Bredice v Doctors Hosp, Inc,* 50 FRD 249 (D DC, 1970), and *Davidson v Light,* 79 FRD 137 (D Colorado, 1978)--already had been considered and rejected by the Court of Appeals in *Dye v St John Hosp and Med Center, supra.* In *Dye,* the plaintiff argued that the peer review statutes protect only "retrospective" review of past incidents, rather than "prospective" issues such as whether to grant staff privileges to a physician, or "current patient care." In attempting to make this distinction between protected "retrospective" review and supposedly unprotected issues of "current patient care," the plaintiff in *Dye* relied on *Monty v Warren Hosp Corp,* 422 Mich 138, 147; 366 NW2d 198 (1985), which in turn cited *Davidson* and *Bredice. Dye,* 230 Mich App at 667-668.

The *Dye* Court examined *Davidson* and *Bredice,* concluding that the "only import of those precedents" is "that certain 'current patient care' issues are so pressing and immediate that the provision of confidentiality is unnecessary to facilitate open discussion by a reviewing

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

committee." *Id.* at 668. Noting that *Davidson* had involved a gangrene outbreak, the *Dye* Court concluded that "*Monty and Gallagher* might be construed as creating an exception to the statutes' confidentiality provisions for information relating to the investigation and remediation of a specific and immediate health care crisis," but such an exception would not apply in *Dye*. *Id.* at 669-670. The *Dye* Court also stated that, because it concluded that any such exception did not apply, "we need not consider whether the language plaintiff relies on from *Monty* and *Gallagher* is dicta or the propriety of grafting an exception onto Michigan statutes on the basis of foreign precedents having nothing to do with those statutes." *Id.* at 669 n 6 (emphasis supplied).

Cases from other jurisdictions relied upon in *Harrison* also are of little benefit here, because courts are split on the issue of whether incident reports themselves, or statements within incident reports, are subject to peer review protection. The decisions turn on the specific language of each jurisdiction's unique statutes, which differ in material respects from Michigan's broad protection for "records, data, and knowledge" collected "for or by" individuals or committees assigned a professional review function.

For example, in *Columbia/HCA Healthcare Corp,* 936 P2d 844 (Nev, 1997), the Nevada court held that a Nevada statute, which provided that the "proceedings and records of...review committees" are not subject to discovery, does not preclude discovery of "occurrence reports." The court concluded that the Nevada statute is "extremely limited"; relied on legislative history to conclude that only the "internal operations" of peer review were intended to be protected; and noted that the peer review "privilege" is part of the Nevada evidence code, the overall purpose of which is to permit the "truth" to be "ascertained."

Here, in contrast, Michigan courts prior to *Harrison* have held that incident reports are

Kitch Drutchas Wagner Valitutti & Sherbrock
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2000
DETROIT, MICHIGAN 48226-5485

protected (see *Dorris/Gregory, Attorney General v Bruce, Ligouri*). Unlike the "extremely limited" Nevada statute protecting only "proceedings and records" of review committees, the Michigan statutes protect the "records, data, and knowledge" collected for or by committees or individuals, and consistently have been applied to preclude discovery of documents collected for a committee or an individual, not just records of proceedings. The Michigan statutes are found in the Public Health Code that mandates internal hospital "peer review," reflecting that the purpose is to improve quality of medical care, not to ascertain "truth."

In *State ex rel AMISUB, Inc v Buckley,* 618 NW2d 684 (Neb, 2000), a Nebraska court construed statutes creating confidentiality for information provided "upon request" of a committee, and for the "proceedings, minutes, records, and reports" of such a committee, to permit discovery of an incident report. The court concluded that the protection applies only to documents that are generated as a result of a "discrete request" by a hospital-wide committee or to "deliberations within a hospital-wide committee." The court also noted that the Nebraska statutes contain an exception providing that the confidentiality does not extend to "hospital medical records kept with respect to any patient in the ordinary course of business of operating a hospital nor to any facts or information contained in such records." Based on this unique statutory language, the Nebraska court concluded that an incident report consisting of "facts or information" is not protected.

Here, in contrast, the Michigan peer review confidentiality statutes contain no explicit exceptions referring to "facts or information," are not limited to "proceedings, minutes, records, and reports of" peer review committees, and (other than in *Centennial*) never have been construed to apply only to the "deliberations" of a committee.

In *John C Lincoln Hospital and Health Center,* 768 P2d 188 (Ariz Ct App Div 1,

Kitch Drutchas Wagner
Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite
2400
Detroit, Michigan
48226-5485

1989), an Arizona court construed a statute providing for confidentiality of "[a]ll proceedings, records and materials prepared in connection with the reviews provided for in [Arizona's peer review statute[." The court held that the statute protects only the "discussions, exchanges and opinions found in committee minutes." The court further concluded that the incident report did not constitute materials "prepared in connection with the reviews," because, while an incident report might trigger review by a medical staff committee, such review did not always occur and the incident reports "are not made solely for that purpose." *Id.* at 191.

Here, in contrast, the Michigan statutes do not limit confidentiality/privilege to "discussions" or "exchanges" during "proceedings," or to materials prepared "in connection with" a committee review. The much broader Michigan statute protects materials "collected for or by" a committee or an individual assigned a professional review function.

In *Babcock v Bridgeport Hospital,* 742 A2d 322 (Conn, 1999), the Connecticut court held that a statute providing for confidentiality for "the proceedings of a medical review committee conducting a peer review," was intended to "restrict the privilege to the substantive discourse that takes place at the actual meetings..." *Id.* at 343. Given this conclusion, the court held that a committee report was not "generated principally for peer review."

Neither the plain language of Michigan's statutes, nor the long line of Michigan cases construing those statutes, supports limiting Michigan's peer review confidentiality to a "deliberative process" privilege, or excluding from protection an incident report that is collected by an individual assigned a professional review function. The use of the statutory phrase "records, data, and knowledge collected for or by"; the extension of confidentiality to information collected for or by a committee or an individual; and the absence of any statutory language stating that a "review" must have been conducted, or that the information must have

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
Detroit, Michigan
48226-5485

been generated or used in a deliberative process, all establish the breadth of Michigan's unique "peer review" statutes.

For this reason, this Court and the Michigan Court of Appeals (prior to *Centennial*) correctly construed these statutes as having broad application, and have not limited their application to the "deliberative process" or the "review process" itself, but have held that hospital incident reports are subject to protection. *Dorris, supra; Ligouri, supra.*

An attempt to transform Michigan's peer/professional review confidentiality into a protection only for the "deliberative process" also is inconsistent with the language of all three peer review confidentiality statutes, viewed together. MCL 333.20175(8) and MCL 333.21515 protect "records, data, and knowledge collected for or by" individuals or committees assigned a professional review function. MCL 331.533, in contrast, provides for confidentiality for "the record of a proceeding" and "the reports, findings, and conclusions of a review entity" and "data collected by or for a review entity." Unless these terms are read to be mere surplusage, they must refer to three different categories of information: the "record of a proceeding" (minutes, notes, tape or video recordings); the "reports, findings, and conclusions" (documents created or generated by the review entity during or after a review); and "data collected by or for a review entity" (the facts and opinions collected before and during the review). This is entirely inconsistent with any suggestion that confidentiality or privilege was intended by the Legislature to be limited to the "deliberative process," rather than to the facts collected for or by "individuals or committees."

To the extent that decisions from other jurisdictions are relevant at all, several other jurisdictions have held that incident reports are protected under those states' peer review confidentiality statutes. See, for example, *Ussery v Children's Healthcare of Atlanta, Inc*,

Kitch Druchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2100
DETROIT, MICHIGAN 48226-5485

656 SE2d 882 (Ga App, 2008) (an incident report is confidential under a statute protecting "the proceedings and records of a review organization" because the purpose of the form is to "allow the hospital's department of quality/performance improvement to make evaluations that will improve patient care"); *Katherine F v State of New York,* 723 NE2d 1016, 1017 (NY, 1999) (incident report regarding a hospital employee's sexual assault on a patient is protected under a statute prohibiting discovery of "proceedings" and "records" relating to performance of a medical or quality assurance review function); *Community Hospitals of Indianapolis, Inc v Medtronic, Inc,* 594 NE2d 448 (Ind Ct App, 1992) (under statute providing that "[a]ll communications to a peer review committee" are privileged, an incident report that was prepared by an employee and forwarded to the quality assurance department is protected).

5. The *Harrison* Court's holding that "facts" collected "contemporaneously" with an event are not subject to peer review protection will have a significant, widespread negative effect on both civil litigation and the mandated hospital peer/professional review process.

The *Harrison* Court's precedential holding--that "facts" collected "contemporaneously" with an event are not protected by peer review statutes--will have a significant, negative effect on both litigation and the hospital peer review process.

First, the decision is not limited to the facts of this case, or even to cases involving incident reports. Incident reports are commonly used, and it is likely that nearly all incident reports will include "objective facts gathered contemporaneously with an event." Moreover, although protection for incident reports is likely to be the most common scenario to which *Harrison* will be applied, the statement that "facts" collected "contemporaneously" with an event will not be protected could be applied to other types of peer review issues, including meetings with supervisors shortly after an event, or "facts" in a physician's credentialing file.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485

Second, this new exception for "facts" collected "contemporaneously" is ill defined and confusing. In *Harrison*, the Court held that some of the incident report is not protected because it consists of facts collected approximately an hour and a half after the incident, while other portions of the incident report are protected--because they are a "summary" of the result of a "deliberative review process" (or perhaps because they were not written "contemporaneously"; or perhaps because they were not "objective facts"). *Harrison,* 304 Mich App at 27, 34.

This ill-defined exception, and the holding that some but not all of an incident report is protected, has left hospitals and attorneys unsure of the application of peer review protection. This confusion has engendered an increased number of new or renewed discovery requests for documents previously assumed by all parties to be protected peer/professional review.

Most importantly, this holding that certain information will not be protected, and specifically "objective facts," is having a chilling effect on the peer/professional review process. As recognized by this Court, the efficacy of the peer review process is dependent on persons who have information regarding the quality of medical care or the competency of health care providers being candid and forthcoming. Even an ambiguity regarding the scope of peer/professional review confidentiality can reduce the amount and scope of information provided. A broad statement that "objective facts" are not protected, and that witness statements in incident reports are fully available to discovery, will result in a reduction in the number of incident reports prepared and in the detail included.

C. The Arguments Made By Plaintiff-Appellee Should Be Rejected.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2000
Detroit, Michigan 48226-5485

1. Plaintiff's contention that this Court need not reach the issue of the *Harrison* exception, or that peer review protection does not apply in the first instance, is misguided.

Plaintiff contends that this Court need not address the *Harrison* exception because the order requiring production of only the first page of the incident report in this case should be affirmed on an alternative ground: that the incident report was not established to have been collected "for or by" individuals or committees assigned a review or professional review function under MCL 333.20175(8) or MCL 333.21515.

Even if the question of whether this report in its entirety was collected "for or by" an individual or committee "assigned a professional review function" is still an open question in this case (notwithstanding the trial court's application of peer review protection to the second page of the report), the issue of whether the *Harrison* "contemporaneous facts" exception was properly engrafted onto the statute can and should be decided by this Court now. At most, a remand would be required for further consideration of whether this particular incident report as a whole satisfies the statutory definitions. The interests of judicial economy, and the interests of hospitals across the state that have been left in confusion regarding the status of "peer review" protection, warrant consideration and clarification of the *Harrison* "contemporaneous facts" exception now.

To the extent that this Court considers, or directs the trial court to further consider on remand, whether this incident report satisfies MCL 333.20175(8) and MCL 333.21515, plaintiff's repeated contention that the hospital must demonstrate that the incident report was collected by, or "made its way to," a "peer review committee" (plaintiff's brief, pp 14-15, 23), is incorrect. The protection applies to records, data, and knowledge collected for or by "individuals or committees" assigned a "review" or "professional review" function. A supervisor who is assigned a "review function," and collects "data or knowledge," satisfies

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485

this requirement.

2. Plaintiff's contention that application of peer review protection here would "violate" another provision of the Public Health Code (MCL 333.20175(1)) is incorrect.

Plaintiff's contention that to apply peer review protection to "facts" in an incident report would violate another provision of the Public Health Code, MCL 333.20175(1), is incorrect. Plaintiff suggests that MCL 333.20175(1) requires a hospital's "staff" to record all "observations made" in a medical record, and that applying peer review protection to "facts" (i.e. "records, data, and knowledge") would permit a hospital to "choose" to place "facts" in a protected peer review document rather than in a medical record.

There are several flaws in this argument. First, MCL 333.20175(1) does not impose a duty on hospital "staff" to record particular "observations" in a medical record. The determination of which "observations" should be recorded is a question of medical judgment.[7] Instead, section 20175(1) addresses the duty of a "health facility or agency" to "keep and maintain"--i.e. retain--the "full and complete" medical record, including the length of the retention period, the type of information retained, and the manner in which it is retained ("[u]nless a longer retention period is otherwise required...a health facility or agency shall keep and retain each record for a minimum of 7 years....[a] health facility shall maintain the records in such a manner as to protect their integrity, to ensure their confidentiality and proper use, and to ensure their accessibility and availability....[a] health facility or agency may destroy a record that is less than 7 years old [under certain delineated circumstances]" (sec.

---

[7] One can only imagine the lengthy medical record that would be created if every "observation made" is required to be recorded, regardless of the nature of the observation or its relationship, if any, to the provision of medical services.

20175(1) (emphasis supplied)).

Second, even if MCL 333.20175(1) could be said to impose a duty on a "health facility or agency" to ensure that specific "observations" are recorded (as opposed to "kept" or "maintained" for a particular period or in a particular manner), any failure to comply does not alter the question of whether an incident report (or any document or information) constitutes "records, data, and knowledge" that is "collected for or by individuals or committees" assigned a review function. The duty to "keep and maintain" a medical record, and the duty to conduct professional review and the confidentiality/privilege for professional review, are distinct.

Plaintiff's contention that MCL 333.20175(1) is somehow in conflict with MCL 333.20175(8) and MCL 333.21515 rests on an assumption that the existence and application of peer review protection gives a hospital an "incentive" to "shield" information (an assumption that plaintiff seeks to support with citation to an Illinois case, *Roach v Springfield Clinic,* 157 NW2d 29 (Ill, 1993)[8]. There is no reason to believe that the "data" or "knowledge" that might be collected in an incident report is the same type of information that otherwise would be included in a patient's medical record (for example, consider the identity of a patient who assaulted another patient in *Gregory*; or a report that addresses why an event occurred, rather than the fact of its occurrence and the consequences for the patient).

The assumption that facts contained in an incident report can be expected to be harmful to a hospital's defense in civil litigation also is an unwarranted one. There are several

---

[8] The *Roach* holding is inapposite because the Illinois statute protects only the information of "committees" (and the protection was held not to apply because there was no "committee" involved), while the Michigan statutes protect the "records, data, and knowledge" collected "for or by" "individuals or committees."

underlying assumptions here: (1) that the "incidents" underlying such reports regularly become the subject of civil litigation; (2) that the "facts" contained in such reports would be harmful, not helpful, to a hospital's potential defense; and (3) that there is some widespread institutional directive to hospital "staff" that information on an "incident" should be "left out" of the medical records, even if it is relevant to a patient's medical treatment.

The internal peer review processes at hospitals are not necessarily linked to litigation. Incident reports can involve circumstances in which a patient is not injured at all and no litigation is anticipated. Incident reports may contain facts that actually would establish or support a theory of defense in a civil action, and yet the hospital is powerless to use such information in litigation due to the peer review protection. In none of the cases at issue has there been evidence to establish that a health care provider was directed by hospital management to omit from the medical record information that is relevant to a patient's medical treatment. Such a prospective attempt to "bury" facts for future litigation is unlikely, given that no hospital manager ever could predict whether a witness would or would not specifically recall those events under oath at a subsequent deposition.

Even if the existence of peer review protection could be said to provide a hospital with a mechanism by which to "shield" information, such a policy concern does not permit invalidation of the statutory protection, or the adoption of an extratextual exception. The concern expressed by plaintiff here and by the *Roach* Court--that a "privilege" allows a party in litigation to "shield" information or be less than "candid"--could be leveled against any privilege. Surely plaintiff's counsel is not suggesting that all privileges should be eliminated because of crimes against "candor"?

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2000
DETROIT, MICHIGAN
48226-5485

A privilege is not designed to assist in the truth-seeking function. Its existence and scope are a reflection of a determination that some concerns outside litigation are more important than full discovery or presentation of evidence, and each privilege represents a balancing of these competing interests. Here, that balancing function has been performed by the Legislature, which not only established a mandatory internal means of hospital review and improvement of patient care, but concluded that that review is so important and worthwhile that it should be protected with confidentiality, privilege, and immunity for the participants. *Feyz,* 475 Mich at 681.

3. Plaintiff's so-called "textual approach" is not a textual approach at all.

Plaintiff argues that MCL 333.20175(8) and MCL 333.21515 fail to establish that "records, data, and knowledge" are "privileged" and cannot be compelled by court order. Plaintiff's construction of these statutes, however, requires this Court to ignore portions of the statutory text protecting such information against compelled disclosure in a civil action.

MCL 333.20175(8) and MCL 333.21515 provide that "records, data, and knowledge" collected for or by individuals or committees assigned a review function or professional review function (1) "are confidential," (2) "shall be used only for the purposes provided in this article [Article 17 of the Public Health Code]," (3) are not "public records," and (4) "are not subject to" or "shall not be available for" "court subpoena."

For over 30 years, this Court and the Court of Appeals have recognized that these statutes create an evidentiary "privilege" that protects, or may protect (if the requisites for protection are met) "peer review" information against discovery requests and civil court orders compelling disclosure. See *Marchand, supra* (MCL 331.422, predecessor to MCL 333.21515 providing that information "shall be confidential" and "shall not be available for

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

court subpoena" creates an "evidentiary privilege" that potentially could apply to prevent a court from ordering a hospital to answer interrogatories, but does not so apply in that case); *Monty, supra* (describing the protection under MCL 333.20175 and MCL 333.21515 as a "privilege," and remanding for further consideration of whether the protection applies to prevent a court from issuing an order granting a motion to compel production of documents in a civil action); *Dorris, supra* (reversing a trial court order requiring production of an incident report under the authority of MCL 333.20175(8) and MCL 333.21515); *Ligouri, supra* (reversing a trial court order compelling disclosure of an incident report).

The plain language of the statutes also establishes that such information is not subject to such compelled disclosure. First, the mandate in MCL 333.20175(8) and MCL 333.21515 that "records, data, and knowledge" "shall be used only for the purposes provided in this article" has been held to preclude "use" of such information for any "purpose" not "provided in" Article 17 of the Public Health Code. See *Attorney General v Bruce,* 422 Mich at 166; *In re Investigation of Lieberman,* 250 Mich App 381, 387-388; 646 NW2d 199 (2002) (peer review information is not subject to a search warrant in a criminal investigation, because the search warrant does not seek the information for "purposes provided in this article [Article 17 of the Public Health Code] but only for the criminal investigation).

The incident report here is being compelled for the purpose of discovery or admission as evidence at trial in civil litigation (otherwise, it would not be "relevant to the subject matters involved in the pending action" and would not be subject to discovery under MCR 2.302(B)(1)). There can be no question that discovery or trial in litigation is not a "purpose provided in" Article 17 of the Public Health Code. *Attorney General v Bruce, supra.* Thus, MCL 333.20175(8) and MCL 333.21515 prohibit a trial court from compelling information

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS-AND-COUNSELORS
One Woodward Avenue, Suite 2000
DETROIT, MICHIGAN
48226-5485

for such an impermissible use.

MCL 333.20175(8) and MCL 333.21515 also expressly state that "records, data, and knowledge" that otherwise satisfy the statutory definitions "are not subject to" or "shall not be available for" "court subpoena." Plaintiff incorrectly dismisses this provision out of hand, contending that it applies only where the case involves a document titled "subpoena." The phrase "not subject to court subpoena" or "not...available for court subpoena" has not been so narrowly construed.

In *Attorney General v Bruce,* the Attorney General argued that an investigative subpoena issued by a licensing board was not a "court subpoena," and thus that the information was not subject to protection under MCL 333.20175(5) (predecessor of current MCL 333.20175(8)) and MCL 333.21515. This Court rejected that argument, noting that MCL 331.422, a forerunner of MCL 333.21515, contained the same reference to "court subpoena," but went on to include an exception for a "report" made by a hospital to a "medical licensing board." The current statute, MCL 333.21515, eliminated that exception.

This Court concluded that, because a "report" made to a licensing board was included as an exception to the "not available for court subpoena" rule, the term "court subpoena" could not have been limited solely to a subpoena issued in a civil action. *Id.* at 166-167.

The Court of Appeals in *In re Investigation of Lieberman, supra* also rejected such a narrow view of "court subpoena." There, the Attorney General seized information from a hospital pursuant to a search warrant issued by a court in connection with a criminal investigation. The *Lieberman* Court rejected the Attorney General's contention that MCL 333.21515 does not protect information against a search warrant, stating as follows:

> Section 21515 demonstrates that the Legislature has imposed a comprehensive ban on the disclosure of any information collected by, or records of the

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485

> proceedings of, committees assigned a professional review function in hospitals and health facilities. If the specific mention of a court subpoena meant that the privilege existed only as a defense against a subpoena, the statute's general language stating that peer review materials are confidential would become nearly meaningless. Although the statute does not refer to search warrants, it would be inconsistent with the stated purposes of the privilege to find that peer review information could be obtained pursuant to an investigatory search warrant. The protection against discovery through subpoena would effectively evaporate if an investigation needed only to obtain a search warrant instead. [*In re Investigation of Lieberman* at 387.]

The plain language of this provision that information is not subject to, or available for, "court subpoena" also supports application of peer review protection here. The procedural mechanism by which information is compelled to be produced over a hospital's peer review objection in a civil case always will be by court order, as occurred in this case.[9] The question, thus, is whether a court order that resolves a "peer review" objection and compels the production of document is somehow fundamentally different from, or not encompassed within the definition of, a "court subpoena."

As described in Black's Law Dictionary (6th ed), "court subpoena" is nothing more than a particular type of court order that constitutes a "command to appear at a certain time and place to give testimony upon a certain matter" or to produce "books, papers and other things." In the context of such a "command" to produce documents or give testimony, "court order" and "court subpoena" are interchangeable. See MCR 2.506(A)(1) (referring to an "order or subpoena" requiring a party or person to appear and testify); MCR 2.506(B)(1) (providing that a subpoena signed by an attorney of record or clerk of the court "has the force and effect of an order signed by the judge of that court"); MCR 2.305(A)(1) and (2) (a party

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AT LAW CO-LEADER, OFC
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

[9] In this case, plaintiff sought and obtained the first page of the report through the unorthodox procedural mechanism of a "motion in limine" resulting in a court order compelling its production.

may issue a subpoena commanding a non-party to "produce and permit inspection and copying of designated documents"; but the procedures in MCR 2.310 [request for production of documents, with objections resolved by court order] apply to a party).

Thus, a court order commanding a witness to appear for a deposition or at trial, or commanding production of documents, is a "court subpoena" for purposes of MCL 333.20175(8) and MCL 333.21515. These statutes preclude a trial court from entering an order compelling disclosure of information that otherwise meets the statutory prerequisites.

In addition to these mandates that the "records, data, and knowledge" shall be used "only for the purposes provided in this article," and are not "subject to" or "available for" "court subpoena," MCL 333.20175(8) and MCL 333.21515 also provide that "records, data, and knowledge" "are confidential." Plaintiff rejects this provision as an independent basis for a "privilege," contending that "confidentiality" and "privilege" are different concepts. While a scholarly distinction could be made between the terms, plaintiff cites very little authority for the proposition that a statute that mandates that information is "confidential" cannot be construed to include an evidentiary privilege against compelled disclosure by court order. The Michigan statutes plaintiff cites, using both the terms "confidential" and "privileged," do not establish that "confidential" cannot be, or is not, sometimes used interchangeably with "privileged." Black's Law Dictionary (6th ed) combines the concepts, defining "confidential communication" as "privileged communication."

Plaintiff also relies on a journal article that draws a distinction between "privilege" and "confidentiality," but the author of that article acknowledges that state peer review statutes do not make a clear distinction between these concepts. The article actually suggests that, given the absence of sanctions for violation of "confidentiality," there is a question as to

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

whether State legislatures intended to apply "confidentiality" outside the judicial context:

> Since almost all the states mention the confidentiality in the same clause as the description of privilege [footnote citing specifically to Michigan's peer review statutes], it could be argued that the confidentiality language actually applies solely to the judicial context and is part of the privilege granted, but is not meant to give rise to any actionable requirement that the peer review participants keep the information confidential. [Scheutzow, *Confidentiality and Privilege of Peer Review Information: More Imagined Than Real,* 7 Journal of Law and Health, pp 193-194 (1992-1993).]

Plaintiff also incorrectly relies on *Trinity Medical Center, Inc v Holum,* 544 NW2d 148 (ND 1996). That case involved North Dakota statutes providing that "information, data, reports, or records made available to" a committee "are confidential," but that that the "proceedings and records" of a committee are "not subject to subpoena" or "discovery" or "admissible in evidence." The court concluded that it could not rely on other states' case law "because of the lack of uniformity among the various states' peer review privilege statutes," and recognized that the North Dakota statutes create a privilege "much narrower than those in most other states." *Id.* at 153. The Court held that the statutes distinguish between "confidentiality" for records and data made available to the committee, and "privilege" for "proceedings and records" of the committee, and that the North Dakota legislature had declared that the two categories of information should be treated differently by separating them. *Id.* at 157.

Here, in contrast, the Michigan statutes do not provide for privilege only for certain information and confidentiality for others. Instead, all "records, data, and knowledge" are both "confidential" and not subject to court subpoena.

Finally, even if this Court were to conclude that the three provisions in MCL 333.20175(8) and MCL 333.21515 addressing confidentiality, the limited use of information, and its availability for "court subpoena" were not intended by the Legislature to create a

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

"privilege," there is another statute, MCL 331.533[10], that makes it clear that "data collected by or for a review entity under this act" is "not discoverable and shall not be used as evidence in a civil action or administrative proceeding."

D. To The Extent That The *Harrison* Court Held That Hospital Risk Managers Or Defense Attorneys Could Be Sanctioned For Failing To Review, Or Use Confidential Peer/Professional Review Materials For Purposes Other Than Those Permitted By Statute, This Holding Should Be Reversed.

The *Harrison* Court's holding that sanctions were properly granted against the hospital and defense attorney in that case is not directly at issue in this case. This Court, however, directed the parties to address the issue of whether *Harrison* "erred in its analysis of the scope of the peer review privilege, MCL 333.21515." The *Harrison* Court erred in two ways: (1) by creating an extratextual exception for "contemporaneous facts," and (2) by holding or suggesting that a hospital risk manager or defense attorney has a duty to seek out and use confidential peer review information in civil litigation, or be sanctioned for not doing so. The MHA requests that this Court address and clarify both aspects of the *Harrison* decision.

The *Harrison* Court held that peer review protection does not apply to a portion of an incident report, applying an exception for "objective facts." Notwithstanding this conclusion, the Court also held, or at least suggested, that a hospital risk manager (and, perhaps, a defense attorney) has an "ethical" obligation or duty to seek out, review, and use "relevant factual information," even if contained in confidential peer review documents, for purposes of

---

[10] A "review entity" for purposes of MCL 331.533 is defined to include a "duly appointed peer review committee" of a "health facility or agency licensed under article 17 of the public health code..." MCL 331.531(1)(a)(iii). Thus, MCL 331.533 will apply in cases that involve a "duly appointed peer review committee."

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

defending a civil medical malpractice action.

According to the *Harrison* Court, this obligation exists even if the hospital risk manager "appropriately believed that the entirety of the incident report was confidential pursuant to MCL 333.21515." *Harrison,* 304 Mich App at 35. This is because, the Court concluded, a hospital risk manager cannot "avoid" reviewing or considering "potentially privileged documents" for the purpose of preparing or pursuing a defense to civil medical malpractice litigation:

> Nor do we accept as a general proposition, divorced from this case, that a risk manager may deliberately avoid reviewing or considering relevant *factual* information if doing so involves consulting potentially privileged documents. Certainly, the peer review privilege statutes were not intended to prevent a hospital from reviewing its own records. And we have located no law from any jurisdiction suggesting that a hospital may ethically present a medical malpractice defense directly conflicting with the hospital's knowledge of how an event occurred. [*Harrison,* 304 Mich App at 35.]

With the threat of sanctions looming in every single case in which an incident report or other "relevant factual information" constituting confidential peer review exists, hospitals and their counsel have been left without guidance on several important points:

1. Do hospitals and their attorneys have an obligation--enforceable by a trial court through imposition of personal or institutional sanctions--to seek out, examine, and use confidential peer review information (or information "appropriately believed" to be confidential peer review information) for the purpose of ensuring that a defense in civil litigation is not in "direct conflict with" facts contained in the peer review materials?

2. If hospital employees or hospital attorneys actually have reviewed confidential peer review information, do hospitals and their attorneys then have an obligation to conform a defense in civil litigation to "relevant factual information" contained solely in those peer review documents--even if that review occurred only in order to object to discovery requests from the opposing party seeking those documents?

3. Can hospital employees or attorneys be sanctioned for not seeking out, reviewing, or using information that they in good faith believed to be confidential peer review

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
Detroit, Michigan 48226-5485

information, but was later held not to constitute confidential peer review?

This Court should make it clear that hospital employees and hospital attorneys do not have a duty to seek out and review confidential peer/professional review information for the purpose of ensuring that a defense in civil litigation is not "in direct conflict with" the peer review information. MCL 333.20175(8) and MCL 333.21515 unambiguously provide that peer review "records, data, and knowledge" are "confidential" and "shall be used only for the purposes provided in this article." As held in *Attorney General v Bruce,* 422 Mich at 165, this language is unambiguous and limits use of the information to the purposes provided in Article 17. Such purposes do not even include State licensing investigations of health care providers, see *Attorney General v Bruce, supra,* much less civil actions for medical malpractice.

The *Harrison* Court's error was in treating these statutes as creating merely an ordinary, evidentiary "privilege." The statutory directive that such "records, data, and knowledge" are "confidential" and "shall be used only for the purposes provided in this article" is clear. These statutes do not require, or permit, hospital risk or claims managers or defense attorneys to seek out and review "confidential" information for use in litigation.

Likewise, MCL 331.533 provides that "data collected by or for a review entity under this act" are "confidential," are "not discoverable," and "shall not be used as evidence in a civil action or administrative proceeding." While MCL 331.532 does permit disclosure of such information for certain enumerated purposes (including health care research or reviewing the qualifications, competence, and performance of a health care professional), these purposes have nothing to do with release of the information to a plaintiff in a civil medical malpractice action. *Dye,* 230 Mich App at 673.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

The *Harrison* Court's characterization of the issue as one of whether a "hospital" should review "its own records," or whether a hospital may "ethically" present a defense that

conflicts with "the hospital's knowledge of how an event occurred," is imprecise and inappropriate in this context. The acts or "knowledge" of a corporate entity such as a hospital are those of its individual employees or agents. *Cox v Flint Bd of Hosp Managers,* 467 Mich 1, 12; 651 NW2d 356 (2002).

Hospital employees are not permitted to have access to all hospital "records" merely by virtue of their employment. Individuals who are assigned a professional review function, are members of a committee assigned a professional review function, or are assigned to collect or maintain "records, data, and knowledge," will have access to peer review materials. Others hospital employees ought not to be assumed to have, or have had, such access.

In *Harrison*, the hospital risk manager was a participant in a peer review process, with another role as a claims manager for litigation. In other hospitals, the functions of "risk manager" and "claims manager" may be entirely divorced, such that the claims manager who handles defense of civil litigation may have had no involvement in the peer review process. Suggesting that a "hospital" should "review its own records" means that a hospital employee not involved in the peer review process should seek out and review those materials solely for the purpose of ensuring that a defense in civil litigation is consistent with information contained in those peer/professional review materials. This is in conflict with MCL 333.20175(8), MCL 333.21515, and MCL 331.532 and 533, delineating the only permitted uses of such information.

There should not be any "bright line" rule stating that a hospital or hospital attorney must conform a defense to "conflicting" facts that are gleaned only from a review of confidential peer review information. Such a rule raises a host of practical problems in litigation of these cases, to which there is no single, generally applicable answer. Rather than

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

imposing a rule, backed by a threat of sanctions, that a hospital or hospital attorney must conform a defense to facts that are learned from, and could be established solely through use of inadmissible, confidential peer/professional review materials, the duties of a hospital or hospital attorney should be those generally applicable to all attorneys and parties in litigation.

If, for example, a discovery request implicates information that is or may be subject to peer review protection, a discovery response should reflect the existence of that information (such as, for example, the fact that an incident report exists), and that the information is asserted to be subject to peer review protection, without revealing the content of the peer/professional review information. In this way, the fact that peer/professional review information may contain facts responsive to the discovery requests is revealed, but the protection is asserted and properly determined by the trial court.

The obligations of witnesses and attorneys to provide truthful information also are governed by generally applicable rules and law, including witness oaths, perjury laws, and attorney ethics rules.

As this Court has recognized, facts generally are discoverable by other, non-privileged methods, such as witness testimony regarding observations of the underlying events, or documents that reflect those events. It is an unusual case in which no such other evidence exists to establish the facts, and that unusual circumstance ought not to be used as a reason to impose a rule on all cases involving confidential peer/professional review information.

CONCLUSION

At least two troubling aspects of the *Harrison* decision should be addressed, and reversed or clarified by this Court. First, the *Harrison* Court's adoption of an extratextual exception to statutory peer review confidentiality for "objective facts" that are collected

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

"contemporaneously with an event," should be rejected by this Court. Such an exception finds no basis in the text of the statutes. The exception is based upon an analysis of the scope of peer review that is in direct conflict not only with the plain statutory language but also with a long line of Michigan cases, including controlling decisions of this Court.

Second, the *Harrison* Court's conclusion that a hospital risk manager or defense attorney has, or may have, a duty to review and examine peer/professional review materials in order to pursue a defense to civil litigation also is in conflict with the peer/professional review confidentiality statutes. Those statutes limit use of such information to purposes authorized by those statutes and/or Article 17 of the Public Health Code. Use of confidential peer/professional review information for purposes of civil litigation is not permitted.

RELIEF REQUESTED

WHEREFORE, amicus curiae Michigan Health & Hospital Association respectfully requests that the Court issue an order or opinion holding that:

1. There is no exception to the peer/professional review confidentiality statutes (MCL 333.20175(8), MCL 333.21515, and MCL 331.533) for "objective facts" that are collected "contemporaneously with an event."

2. Incident reports containing "objective facts," whether collected "contemporaneously" with an event or afterward, are subject to peer/professional review confidentiality if they consist of "records, data, and knowledge" that is "collected for or by" an individual or committee assigned a professional review function.

3. Peer review confidentiality under the statutes set forth above is not limited to the "deliberative process" of a peer review committee or individual.

4. To the extent that *Harrison* and/or *Centennial* hold otherwise, those cases are

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485

overruled and are no longer good law.

5. Hospital employees and hospital attorneys do not have a duty to seek out, examine, consider, and use information subject to peer/professional review confidentiality for purposes of ensuring that participating in civil litigation is not "in conflict with" that information.

6. Hospital employees and hospital attorneys do not have a specific duty to use information subject to peer review confidentiality for purposes of civil litigation, even if they have reviewed the information, such as for the purpose of asserting peer review protection in response to discovery requests, or as part of the peer review process, unconnected with the litigation. Instead, the duties applicable in these circumstances are no greater than duties generally applicable to all parties and attorneys in civil litigation.

Respectfully submitted,

KITCH DRUTCHAS WAGNER
VALITUTTI & SHERBROOK

By: Christina A Ginter

CHRISTINA A. GINTER (P54818)
Attorney for Amicus Curiae
Michigan Health and Hospital Association
One Woodward Avenue, Suite 2400
Detroit, MI 48226-3430
(313) 965-7841

Dated: November 17, 2014